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11 **UNITED STATES DISTRICT COURT**  
12 **SOUTHERN DISTRICT OF CALIFORNIA**

13 JAVIER RAYGOSA,  
14

15 Petitioner,

16 v.

17 CALIFORNIA DEPARTMENT OF  
18 CORRECTIONS, et al.,

19 Respondents.  
20

Case No. 12-cv-626 BAS (MDD)

**ORDER:**

(1) **ADOPTING REPORT AND  
RECOMMENDATION;**

**AND**

(2) **GRANTING  
PETITIONER'S HABEAS  
RELIEF**

**[ECF 10]**

21 On November 11, 2009, Petitioner Javier Raygosa appealed his rule  
22 violation, which was denied. ECF 10, 35–37. After exhausting his administrative  
23 remedies, he filed a Petition for Writ of *Habeas Corpus* in the California Superior  
24 Court, Imperial County on July 14, 2010. *See* Lodg. 6. The state court held that his  
25 rule violation was supported by “some evidence,” and therefore he was granted  
26 constitutional due process. ECF 10, 17. He filed a second *habeas* petition, this time  
27 in the California Court of Appeal, on October 1, 2010. Lodg. 8, 4–12. The  
28 appellate court found that there was some evidence that he solicited or conspired to

1 introduce a controlled substance into the prison. ECF 10, 19. On February 17,  
2 2011, Petitioner filed a *habeas* petition with the California Supreme Court, which  
3 was denied without comment. *Id.* at 20.

4 On March 12, 2012, Petitioner filed a petition for *habeas* relief with this  
5 Court, pursuant to 28 U.S.C. § 2254. ECF 1. This petition was defective, and  
6 therefore the Court dismissed it without prejudice. ECF 2. On July 23, 2012,  
7 Petitioner filed his First Amended Petition (“Petition”). ECF 10.

8 In his Petition, Petitioner contends that his rules violation finding was  
9 arbitrary and capricious, in violation of his due process rights. ECF 10. He claims  
10 his offense was wrongly termed as distribution instead of possession. *Id.*

11 On September 23, 2014, Magistrate Judge Mitchell Dembin reviewed his  
12 Petition and recommended that this Court grant it. ECF 55. Respondent California  
13 Department of Corrections opposed the recommendation. ECF 56. For the  
14 following reasons, the Court **ADOPTS** the recommendation in its entirety (ECF  
15 55), **OVERRULES** Respondent’s objections (ECF 56), and **GRANTS** the Petition  
16 (ECF 10).

## 17 **I. LEGAL STANDARD**

18 A district court’s duties concerning a magistrate judge’s report and  
19 recommendation and a party’s objections thereto are set forth in Rule 72(b) of the  
20 Federal Rules of Civil Procedure and in 28 U.S.C. § 636(b)(1). Specifically, the  
21 district court “must make a *de novo* determination of those portions of the report . .  
22 . to which objection is made,” and “may accept, reject, or modify, in whole or in  
23 part, the findings or recommendations made by the magistrate.” 28 U.S.C. §  
24 636(b)(1)(c); *see also United States v. Raddatz*, 447 U.S. 667, 676 (1980); *United*  
25 *States v. Remsing*, 874 F.2d 614, 617 (9th Cir. 1989).

26 The U.S. Supreme Court, in *Superintendent v. Hill*, 472 U.S. 445, (1985),  
27 requires petitioners to “demonstrate that the decision reached was arbitrary and not  
28 supported by ‘some evidence.’” This standard is met if “there was some evidence

1 from which the conclusion of the administrative tribunal could be deduced....”  
 2 *United States ex rel. Vajtauer v. Commissioner of Immigration*, 273 U.S. 103, 106  
 3 (1927). This is separate from the constitutional due process requirement that each  
 4 material element reach the requisite evidentiary burden.

## 5 **II. ANALYSIS**

6 Petitioner was found to have violated California Code of Regulation Title 15  
 7 § 3000, distribution of a controlled substance. “Distribution” includes “the sale or  
 8 unlawful dispersing, by an inmate . . . of any controlled substance; or the  
 9 solicitation of or conspiring with others in arranging for, the introduction of  
 10 controlled substances into any institution . . . for the purposes of sales or  
 11 distribution.” *Id.* Respondent summarizes the facts supporting the finding,  
 12 “Raygosa’s approved visitor (Ms. Bermudez) had seven bindles of marijuana  
 13 weighing a total of 12 grams secreted in her vagina, correctional officers observed  
 14 her passing something to Raygosa’s mouth via a kiss, [and] Raygosa was found to  
 15 have a pungent odor coming from his mouth and green leafy particles on his  
 16 tongue[.]” Obj. to R&R, 2:6–9, ECF 56. The California Court of Appeal adopted  
 17 the same facts. *See id.* at 5:11–16. Based on these facts, Respondent argues the  
 18 evidence sufficiently shows Petitioner distributed a controlled substance to find a  
 19 rule violation.

20 The evidence taken in the light most favorable to Respondent supports a  
 21 possession of a controlled substance violation, California Code of Regulations §  
 22 3016(a). However, these facts provide no evidence to support Petitioner’s intent to  
 23 distribute. Crucially, there is no evidence that Ms. Bermudez would have had any  
 24 opportunity to remove the securely stowed bindles such that she could transfer  
 25 them to Petitioner. Without this or similar evidence, it cannot be deduced that the  
 26 marijuana passed to Petitioner was more than for personal use. Because there is *no*  
 27 evidence of distribution, and *Hill* requires “some evidence,” the decision violated  
 28 the U.S. Constitution. Accordingly, the Court agrees with the Judge Dembin’s


1 recommendation.

2 **III. CONCLUSION & ORDER**

3 After considering Petitioner's objections and conducting a *de novo* review,  
4 the Court concludes that Judge Dembin's reasoning in the recommendation is  
5 sound. In light of the foregoing, the Court **ADOPTS** the Report in its entirety  
6 (ECF 56), **OVERRULES** Respondent's objections, **GRANTS** Petitioner's First  
7 Amended Petition (ECF 10) for a writ of *habeas corpus*, and **ORDERS**  
8 Respondent take appropriate administrative action consistent with this ruling.

9 **IT IS SO ORDERED.**

10 Dated: December 12, 2014

11   
12 Hon. Cynthia Bashant  
13 United States District Judge  
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